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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,364	12/08/2003	Michael T. Morman	KCX-654B (19124B)	2821
22827	7590	02/24/2011	EXAMINER	
DORITY & MANNING, P.A. POST OFFICE BOX 1449 GREENVILLE, SC 29602-1449			CRAIG, PAULA L	
			ART UNIT	PAPER NUMBER
			3761	
			MAIL DATE	DELIVERY MODE
			02/24/2011	PAPER

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MICHAEL T. MORMAN, PATRICIA H. CALHOUN, and  
JAMES M. CARR

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Appeal 2009-011611  
Application 10/730,364  
Technology Center 3700

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Before: WILLIAM F. PATE III, LINDA E. HORNER, and  
KEN B. BARRETT, *Administrative Patent Judges*.

PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1-9, 13, 14, 16-19, and 25, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b). This case is related to Appeal 2009-011564 in Application 10/730,493, for which a Decision was issued on September 16, 2010.

We reverse.

The claims are directed to an absorbent article. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An absorbent article, comprising:
  - a chassis having a front waist region, a back waist region, and a crotch region extending between said front and back waist regions;
  - an outer cover member extending longitudinally between said front and back waist regions;
  - a bodyside liner extending longitudinally between said front and back waist regions;
  - a non-extensible absorbent body structure sandwiched between said outer cover member and said bodyside liner;
  - said bodyside liner comprising a material having
    - an untensioned and ungathered, inherently extensible base layer of a fluid permeable material, said base layer extendable to at least about 125% of its original dimension in a first direction essentially without fracture of said base layer material;
    - at least a first and a second strip of substantially untensioned elastomeric material wholly disposed on and attached to said base layer material to form flat planar composite regions with a space between said strips such that a center untensioned region of said base layer material is bordered on at least two longitudinally extending sides by said composite regions of said elastomeric materials and said base

layer material, said center region generally disposed over said absorbent body structure; and

wherein said center region of untensioned base layer material is bonded directly to the immediately underlying portion of said absorbent body structure in registry with the center region of untensioned base layer material in its untensioned condition and said composite regions are stretchable in at least a second direction of said absorbent article.

### REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Serbiak	US 5,846,232	Dec. 8, 1998
Krautkramer	US 6,231,557 B1	May 15, 2001
Popp	US 2002/0087139 A1	Jul. 4, 2002

### REJECTIONS

Claims 1-4, 6, 8, 9, and 25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Serbiak. Ans. 3.

Claims 5 and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Serbiak, and Krautkramer. Ans. 9.

Claims 13, 14, and 16-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Serbiak, and Popp. Ans. 10.

### OPINION

Independent claims 1 and 25 each require the base layer material to be “bonded directly to the immediately underlying portion of said absorbent body structure.” The Examiner contends that Serbiak’s description of the base structure 26 as “effectively attached”, “fixedly attached” or “effectively fixedly attached” suggests that the base layer material is directly bonded to

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the absorbent body structure. Ans. 5; *See* Serbiak, col. 9, ll. 33-35; claims 3 and 12. The Examiner's argument is one of inherency. This argument is not persuasive because the terms used by Serbiak to describe the particular type of attachment do not necessarily require direct bonding. *Ex parte Levy*, 17 USPQ2d 1461, 1464 (BPAI 1990).

Alternatively, the Examiner acknowledges that Serbiak does not expressly teach the base layer "bonded directly" to the absorbent body but contends that this would have been an obvious modification and that direct and indirect bonding are equivalent. Ans. 5-6, 16-17. Appellants counter that one of ordinary skill in the art would "avoid the risk of degrading either the permeability of the bodyside liner or the capillary absorbency of the portion of the absorbent body structure facing the bodyside liner, if the bodyside liner portion of the absorbent body structure is bonded directly to the immediately underlying portion of the absorbent body structure." App. Br. 12. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *cited with approval in KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). The Examiner has failed to articulate any reasoning with a rational underpinning to support the conclusion that directly bonding the layers would have been an obvious modification or that direct and indirect bonding are equivalent in the art. The Examiner's reliance on Popp and the Specification is misplaced. *See* Ans. 16-17. Expressly defining the term "bonded" or "attached" to include both indirect and direct methods does not establish that the two methods are structural and/or functional equivalents such that one of ordinary skill in the art would view them as interchangeable.

Furthermore, the Examiner recognizes that none of the embodiments of Serbiak disclose the materials of the claimed subject matter arranged in the manner as claimed. Ans. 3-8; *see also* Reply Br. 2-4. Thus the Examiner must rely on various features from the individual embodiments of Serbiak and general statements in Serbiak that the embodiments can be combined. *See, e.g.*, Serbiak, col. 12, ll. 24-30. In our view, the Examiner has also not articulated any reasoning with a rational underpinning as to why one of ordinary skill in the art would pick and choose various features from the individual embodiments of Serbiak to construct the claimed subject matter. In our view, the rejection of independent claims 1 and 25 is based on impermissible hindsight reconstruction of the claimed subject matter.

For these reasons, the rejection of claims 1 and 25 and dependent claims 2-4, 6, 8 and 9, must be reversed. Since neither Krautkramer nor Popp, as applied by the Examiner, cure the deficiencies of Serbiak, the rejections of claims 5, 7, 13, 14, and 16-19 must also be reversed.

#### DECISION

For the above reasons, the Examiner's rejections of claims 1-9, 13, 14, 16-19, and 25 are reversed.

#### REVERSED

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